No. 11,461

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SUE HOO CHEE, *Appellant,*
vs.
UNITED STATES OF AMERICA, *Appellee.*

BRIEF FOR APPELLEE.

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SUE HOO CHEE,	*Appellant,*
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BRIEF FOR APPELLEE.

Appeal from a judgment and order made by the United States District Court for the Northern Division of the Northern District of California, sentencing appellant for the felonious concealment of opium in violation of Title 21 USCA Section 174, to a term of two years and a fine of One Thousand Dollars.

THE INDICTMENT.

The indictment charges the defendant Sue Hoo Chee in one count as follows:

That on or about the 17th day of August, 1946, at the City of Marysville, County of Yuba, within said

Northern Division of the Northern District of California, Sue Hoo Chee, whose full and true name is, other than hereinabove stated, to said Grand Jurors unknown, did unlawfully, knowingly and fraudulently conceal and facilitate the concealment of a certain derivative and preparation of opium, to-wit, smoking opium, more particularly described as approximately forty-eight (48) grains of smoking opium, which said smoking opium had been imported into the United States of America contrary to law, as said defendant then and there well knew.

21 USCA Section 174.

APPELLANT'S ASSIGNMENT OF ERROR.

Appellant assigns three errors:

1. The United States Attorney was guilty of prejudicial misconduct in charging that appellant's wife used narcotics.

2. The District Court erred to the prejudice of appellant in permitting the United States Attorney to offer evidence that appellant's wife used narcotics, over the objections of appellant that such evidence was incompetent, irrelevant, immaterial, and prejudicial.

3. The District Court erred to the prejudice of appellant in permitting the United States Attorney to offer evidence that appellant operated a gambling house, over the objections of appellant that such evidence was incompetent, irrelevant, immaterial, and prejudicial.

FACTS OF THE CASE.

On the 17th day of August, 1946, Arnold C. Lachenauer, the federal narcotic agent in company with Dennis McAuliffe, a police officer connected with the City of Marysville Police Department, at approximately 10:30 P. M. on said date were located in Mr. McAuliffe's automobile parked on First Street in the City of Marysville. At this time Mr. Lachenauer and Mr. McAuliffe were keeping under observation the premises of 306 First Street, located a short distance from their car, which premises were known to be occupied by the appellant. After a short period of time, two men who appeared to be Chinese came from the premises at 306 First Street and one of these men walked directly across the street and entered an establishment located there. After some few minutes this same individual, who proved to be the appellant, walked up First Street and past the location of the officers' car which was parked diagonally with the curb. The appellant was seen to walk to the corner of First and Elm Streets and then proceed up the block on Elm Street and out of the view of the officers.

After some few minutes had passed, the appellant then came back to the corner of First and Elm Streets and proceeded a short distance along First Street at which time he was located approximately in front of the officers' car. Mr. McAuliffe then called out "Henry", which was the American name by which appellant was known and by which name he was known to Mr. McAuliffe. At this time the appellant was observed to stoop down, looking toward the officers, and seen to

make a quick motion with his arm as if throwing something. Mr. Lachenauer testified that at this time he saw something white leave the appellant's hand. (Tr. page 41.) The evidence disclosed that appellant at this time was partially obscured from view by a fig tree which was located there between the officers' car and the walk provided for pedestrians. Officer Lachenauer, upon alighting from their automobile, and in the presence of appellant, stated to Officer McAuliffe, "I saw him throw something." (Tr. page 41) and at that time while Officer Lachenauer stood with appellant, Officer McAuliffe went to the spot indicated, some few feet back from the fig tree and there with the aid of his flash light "saw a small bindle that was wrapped in light paper and brought it over to Agent Lachenauer and handed it to him." (Tr. 20, 30.) This bindle proved to contain smoking opium or narcotics, and was marked Government's Exhibit No. 1, subsequently admitted into evidence, and constituted the narcotics the unlawful concealment and possession thereof for which appellant was convicted. This bindle was wrapped in a light colored tissue paper constituting an outer wrapper, which tissue paper proved to be similar in character to that found in the home of the appellant. The evidence disclosed that this paper, which was individual in character and dissimilar to the type of tissue paper familiar to our experience, as appears from the evidence, apparently came from China.

Officers Lachenauer and McAuliffe, in company with the appellant and also in company with Mr. John

Dower, the County Probation Officer and a Marine Lieutenant by the name of Tribble proceeded to the premises at 306 First Street. The appellant then opened the door of his premises at 306 First Street by the use of a key and all parties mentioned then entered the premises. The appellant, although cautioned to the contrary, upon entering his premises hollered out the name "Carmen". (Tr. page 46.)

At that time appellant's wife was in the upstairs portion of the premises and Officer McAuliffe, having been acquainted with her proceeded upstairs to question her. Subsequently, Mrs. Mary Allread, Police Matron for the City of Marysville was summoned in connection with the questioning of appellant's wife and the search of the premises and all officers proceeded to search the property for the purpose of possible discovery of additional narcotics. No presence of narcotics was discovered at the premises and after a period of time had elapsed the officers left the premises, taking appellant to the Police Station. Prior to appellant's leaving his wife he was heard to make the statement to her "Don't tell them anything; tell them nothing." (Tr. page 67.) The foregoing substantially outlines events transpiring from the time appellant's premises were placed under observation by the officers to the time appellant was taken into custody by the arresting officers.

ARGUMENT.

Appellant assigns as error a question directed to the appellant by the Government on cross-examination pertaining to the knowledge on the part of appellant of the use by appellant's wife on the evening of August 17, 1946, of smoking opium. It is contended that the Government was guilty of prejudicial misconduct by deliberately attempting to invoke into the trial prejudicial and immaterial matter concerning the use of narcotics by appellant's wife.

It is respectfully submitted that this question directed to appellant on cross-examination was proper and did pertain to a material issue in so far as relation to the offense with which appellant stood charged. The appellant was charged with the wilful possession and concealment of narcotics, to-wit: opinion; and referral to the Reporter's Transcript, page 147, discloses that appellant denied ever having seen opium or ever having seen any substance similar to Government Exhibit No. 1 which was the bindle of smoking opium found near appellant.

It is submitted that the Government, acting in good faith, was therefore entitled to go into the matter on cross-examinaion directed to the inquiry as to whether or not appellant had not come in actual contact with smoking opium on the same evening in his own home by witnessing or having knowledge that his wife had smoked opium. The good faith in this respect is disclosed by the later attempt on the part of the Government to establish through the testimony of Mr. Lachenauer, the narcotic agent, that appellant's wife had,

in his opinion, been, shortly prior to entry of the residence, smoking opium. This inquiry going to the question of such knowledge or lack of knowledge on the part of appellant was directly connected with the issue in this case and particularly in view, as heretofore stated, of the nature of appellant's testimony to the effect that he had no knowledge of opium or that he had never seen narcotics in such form before. The evidence disclosed that appellant left his residence and presumably the presence of his wife some 10 or 15 minutes prior to the time that he was seen to throw the bindle of opium and consequently in determining the guilt or innocence of appellant so far as his possession of such opium, it is submitted it was competent to prove in this case that appellant's wife had been shortly before such time using smoking opium. Of course, as disclosed by the record (Tr. page 174) the Government was not permitted to establish the fact that in the opinion of Mr. Lachenauer, the Narcotic Agent, appellant's wife, had shortly prior thereto, been using smoking opium. The Court also sustained appellant's objection (Tr. page 151) in the first instance and upon cross-examination of appellant relating to his knowledge of use by appellant's wife of narcotics.

It is therefore submitted that the questions asked by the Government on cross-examination of appellant were proper and material to the principal issue in the case.

> "Circumstances attending a particular transaction under investigation by a jury if so inter-

woven with each other and with the principal fact that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence."

Vilson v. U. S. (CCA 9), 61 F. (2d) 901.

"The common object of the associated persons forms a part of the res gestae and evidence was admissible even though conspiracy was not charged."

Cossack v. U. S. (CCA 9), 82 F. (2d) 214, 216.

In answer to appellant's contention of error assigned under Point No. 2 of Specification of Errors, it is disclosed that appellant's wife on direct examination (Tr. page 160) was asked the direct question as to whether or not she used narcotics. The following questions and answers appear:

"Q. Now do you use narcotics?
A. Absolutely not.
Q. Have you ever used them?
A. No.
Q. Ever had them in your possession?
A. Never had.
Q. In that place or any other place?
A. No place. I never did see any until that night when he brought that up there."

(Tr. p. 160.)

Certainly there could then be no complaint of error on the part of the Government on cross-examination of going into the matter pertaining to the use by appellant's wife of narcotics or smoking opium. If for

no other reason such questions were proper for the purpose of laying a foundation for impeachment of such witness' testimony. It cannot be contended that such questions constituted prejudicial error or were not material to the issue of the guilt or innocence of appellant.

The case of *Ingram v. U. S.*, 9 Cir. 1939, 106 F. (2d) 683, cited by appellant in support of the contention of prejudicial error committed by the Government has no bearing upon the circumstances as presented in instant case. This conclusion is clearly shown by the following language appearing at page 684 of the opinion. That language is as follows:

> "* * * However, the questions addressed to her were not a cross of her direct examination. Instead of being cross-examination, they introduced an entirely new field of discussion, not relevant to the direct examination, namely, the private life of Mrs. Ingram. The method used was an inquiry as to the continuity of the wife's living with her husband during years prior to the charged offense and then questioning as to claimed improprieties in her conduct, inconsistent with that of a continued marital relationship. It is obvious that the main purpose of entering into this area, irrelevant to the direct examination, was to degrade her in the minds of the jury. The prejudicial effect of the questions is obvious. Also it is our opinion that had they not been asked the jury well could have believed her explanation of her husband's presence and that of his belongings in Woods' rooms."

In answer to appellant's specification of error under Point No. 3, that is, questions directed by the Government relating to the fact that appellant operated his premises also as a gambling establishment, there can be no question of the application of the law in such respect. Appellant testified on direct examination (Tr. pages 114-115) that his business was and had been that of operating a soda fountain and ice cream parlor. The representative of the Government certainly committed no error, but to the contrary would have been derelict in his duty if on cross-examination the appellant had not been asked questions pertaining to the fact that appellant also operated his establishment as a gambling business. The law is also well established that where a character witness has testified that a defendant's reputation for truth, honesty and integrity in the community is good, that it is then proper on cross-examination of such character witness to inquire into such witness's knowledge concerning matters such as illegal activities which might bear upon the witness's testimony concerning such general reputation. (Tr. page 75.)

People v. Buchanan (1932), 119 Cal. App. 523, 6 P. (2d) 538;

Stewart v. U. S., 104 F. (2d) 234, 70 App. DC 101;

King v. U. S., 112 F. 998, 50 CCA 647.

It will be noted in this respect, that regardless of the Government's position, which it is contended was absolutely proper, that the Court (Tr. page 76) nevertheless sustained appellant's objection to such question.

The appellant in this instance certainly received greater protection than he was entitled to under the law.

The character witness for appellant, as disclosed by the Record (Tr. page 72), was called to testify out of order and consequently when appellant, on cross-examination (Tr. page 137) admitted the operation of his business as a gambling establishment it became unnecessary to further impeach appellant's testimony on direct examination and impeach appellant's general reputation by the introduction of testimony by way of rebuttal. Consequently, contrary to the contention of appellant, the Government did not offer such evidence but such evidence was introduced by appellant himself on his cross-examination.

It is respectfully submitted that taking into consideration the facts of this case as a whole, no error in the admission of evidence nor prejudicial misconduct on the part of the Government was committed. The Government properly inquired into the matter of appellant's knowledge of smoking opium in his home when appellant, on direct examination, and also on his cross-examination, denied ever having seen opium before. This inquiry was proper by way of impeachment of appellant and was direcly connected with the charge against the appellant of unlawful possession of narcotics. The fact that such inquiry related to his knowledge of use of smoking opium in his home on the same date by his wife did not constitute such inquiry as to knowledge inadmissible, immaterial, or result in any prejudicial misconduct on the part of the

Government. As heretofore indicated, the Government wholly in good faith attempted to support its right of impeachment in this respect by offering testimony by the Narcotic Agent, who unquestionably was qualified by years of experience as an expert to establish such fact as to whether an individual had been immediately prior to his observation, using narcotics by smoking of opinion. Also, it became material and proper on cross-examination of appellant's wife, to lay a foundation for the purpose of impeaching her testimony concerning her use of narcotics by the smoking of opium, whether or not such proof might injure the appellant, it nevertheless was a proper consideration in determination of appellant's guilt. Use by appellant's wife of smoking opium shortly prior to the apprehension of appellant, where the evidence disclosed appellant had been constantly living with his wife and had left her presence shortly before, did go directly to the determination of appellant's truthfulness in respect to his testimony that he had not had the bindle of smoking opium in his possession and had never seen any smoking opinion before. Therefore, the Government's questions on cross-examination of both appellant and his wife were proper questions for the purpose of impeachment concerning matters bearing directly on the issue in the case, i.e., whether appellant unlawfully possessed the narcotics in question on the evening of August 17, 1946, some few minutes after having left the presence of his wife at their home and place of residence. The Government has refrained from a discussion of the question of suf-

ficiency of the evidence to support the verdict in this case as appellant has made no contention that there was a lack of evidence to support the verdict. Clearly there can be no question in this respect. The testimony of Mr. Lachenauer and Mr. McAuliffe is unequivocal in support of the conclusion that appellant at the time in question, August 17, 1946, did possess the bindle of opium which he threw to the ground upon being addressed by Mr. McAuliffe. Appellant's own witness, Mr. Broxson, a legal photographer, testified on cross-examination (Tr. pages 105, 106) that under the physical conditions, location of the fig tree with respect to the position of the Government's agents, on the evening in question that such agents would have been able to observe, as they so testified, the physical movements of appellant. The testimony of Mr. McAuliffe is corroborated in every respect, even by the testimony of appellant, except of course, concerning appellant's possession of the narcotics. Appellant himself corroborates all testimony of Mr. Lachenauer and Mr. McAuliffe concerning the entire passing of events up to the point of having made a motion throwing something from his hand. Of course, appellant denies this fact, and denies that he possessed the bindle of smoking opium, the possession of which he was found to be guilty by the verdict of the jury.

Certainly, even if it were to be assumed that any error entered into the trial of the instant case an examination of the entire cause, including the evidence, clearly discloses that the verdict cannot, under any consideration, be deemed a miscarriage of justice.

CONCLUSION.

It is respectfully submitted that judgment should be affirmed.

Dated, Sacramento, California,
May 12, 1947.

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